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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

C. BRENT SCOTT, and
LAW OFFICES OF C. BRENT SCOTT, P.C.,

Petitioners,

v.

STATE BAR OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the State Bar Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED FOR REVIEW

1. May a State Bar Court, consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments, find that an attorney, who was sanctioned $218,299.10, had no probable cause to file lawsuits, and therefore suspend or disbar him, after he had overcome a demurrer and two summary judgment motions in that first lawsuit and the other lawsuits were attempts to overturn the sanctions award?

2. May a State Bar Court, consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments, suspend or disbar an attorney without finding that due process was accorded the attorney by the trial judge who imposed punitive sanctions on the attorney but had not accorded him (1) the right and time to respond in writing to opposing counsel's written motion for sanctions, (2) the right to contest in a full evidentiary hearing the work and time which the bills represented, and (3) the right to have the hearing held before an unbiased judge?

3. Is California Business and Professions Code section 6068, subdivisions (c) and (g), unconstitutional as vague and overbroad because the standards by which attorneys must measure their conduct are undefined and subjective?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, and the respondent, the State Bar of the State of California.

The Professional Corporation, Law Offices of C. Brent Scott, has no parent companies or nonwholly owned subsidiaries to list.

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1. THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS, HIGHLIGHTS A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS AND HAS PROFOUNDLY DISTURBING IMPLICATIONS FOR PLAINTIFFS' ATTORNEYS THROUGHOUT THE COUNTRY WHEN AN ATTORNEY, WHO WAS SANCTIONED $218,299.10, HAD PROBABLE CAUSE TO FILE THAT ACTION, AND WHEN THE REMAINING THREE ACTIONS WERE FILED ON DIFFERENT CAUSES OF ACTION IN AN ATTEMPT TO OVERTURN THE PUNITIVE SANCTIONS LEVIED AGAINST HIM BY A JUDGE WITH CLOSE TIES TO THE DEFENDANTS, WITHOUT ADVANCE NOTICE OF THE REASONS FOR THE SANCTIONS' HEARING, AND

WITHOUT ACCORDING THE ATTORNEY AN EVIDENTIARY HEARING. 14

2. THE DECISION BELOW, BY IMPOSING DISCIPLINE ON PETITIONER OCCASIONED BY THE PUNITIVE SANCTIONS AWARD LEVIED AGAINST HIM WITHOUT INQUIRING INTO THE FACT THAT THE TRIAL COURT DID NOT ACCORD HIM THE RIGHT AND TIME TO RESPOND IN WRITING TO THE CHARGES, THE RIGHT TO CONTEST IN A FULL EVIDENTIARY HEARING THE WORK AND TIME WHICH OPPOSING COUNSELS' DECLARATIONS SET FORTH AND THE RIGHT TO HAVE THE HEARING HELD BEFORE AN UNBIASED JUDGE, VIOLATES THE ATTORNEY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A JURY TRIAL. 20

3. SECTION 6068, SUBDIVISIONS (c) AND (g), OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS UNCONSTITUTIONAL AS VAGUE AND OVERBROAD BECAUSE THE STANDARDS BY WHICH ATTORNEYS MUST MEASURE THEIR CONDUCT ARE UNDEFINED AND SUBJECTIVE. 25

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IN THE
SUPREME COURT OF THE UNITED STATES

C. BRENT SCOTT, et al.,

Petitioners,

v.

STATE BAR OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE BAR OF CALIFORNIA

Petitioners C. Brent Scott, an individual, and the Law Offices of C. Brent Scott, a Professional Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the State Bar Court of California Review Department, entered on October 25, 2002.

OPINIONS BELOW

The Opinion of the State Bar Court Review Department is reported at ___ State Bar Ct. Rptr. ___ [2002 Calif. Op. *Lexis* 5]. [A.1] [1] The order of the Supreme Court of California denying

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[1] The Appendix is filed under separate cover, and is cited to as "A. . ." followed by the page number. References to the Reporter's Transcript of the State Bar Court trial are shown as "RI," "RII," and "RIII," (for each of the three volumes) followed by the page number, and "Exh." plus the number for the trial exhibits, which were numbered 1 - 57

petition for review is reproduced at A 26 and found at 2003 Cal. *Lexis* 3499. Excerpts from the opinion of the trial judge of the U.S. Bankruptcy Court are found at A 28. The Decision and Order Imposing Public Censure and Order Barring Judge Ross From Receiving Assignments is at A 36. The Request to Take Judicial Notice of Bankruptcy Court Findings, which was denied, is at A 39. Rule 953 of the California Rules of Court, showing the finality of the Supreme Court denial - which was not served on Scott - is found at A 42.

JURISDICTION OF THIS COURT

The judgment of the State Bar Court of California, Review Department was entered on October 25, 2002 and certified for publication. Petitioner's petition for review to the California Supreme Court was timely filed and was denied by that court on May 13, 2003, without being served on petitioner, who first saw it on the court's internet page on or about June 21, 2003, after a colleague brought it to his attention. That order became final on June 13, 2003. Under the rule set forth in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 23-25 (1924) and cited by *Marquette Nat'l. Bank v. Omaha Service Corp.*, 439 U.S. 299, 307 n. 18 (1978), petitioner's time to petition for certiorari would expire at the earliest on September 11, 2003. On August 29, 2003, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including October 13, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (1988).

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for the State Bar and 100 - 168 for Scott. Exh. 15A-H was the Reporter's Transcript of the underlying superior court trial in Scott v. Krissman, and that exhibit number will be followed by the page numbers of that transcript.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I provides, in relevant part: "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the Government for a redress of grievances."

U.S. Const. amend. V provides, in relevant part: "No person shall be . . .deprived of life, liberty or property, without due process of law. . . ."

U.S. Const. amend. VII provides, in relevant part: ". . .In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.. . . ."

U.S. Const. amend. XIV, §1, provides, in relevant part: ". . .nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

California Business and Professions Code § 6106 states:

"The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor."

California Business & Professions Code § 6068, provides, in relevant part:

"It is the duty of an attorney to do all of the following:

. . .

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense. . .

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."

California Code of Civil Procedure, section 437c, states, in relevant part:

"(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. ..

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. . .

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. "

California Code of Civil Procedure § 128.5 states in relevant part:

"(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . .

(b) For purposes of this section:

(1) 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section.

(2) 'Frivolous' means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order. . . ."

California Rules of Court, rule 951.5, states:

"Upon review pursuant to rule 301 of the Rules of Procedure of the State Bar of California, or such other rule as may be adopted governing the review of any decisions, orders or rulings by a hearing judge that fully disposes of an entire

proceeding, the Review Department of the State Bar Court shall independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge."

California Rules of Court, rule 952, states, in relevant part:

"A petition to the Supreme Court by a member to review a decision of the State Bar Court recommending his or her disbarment or suspension from practice shall be filed within 60 days after the filing with the Clerk of the Supreme Court of a certified copy of the decision complained of. . . ."

STATEMENT OF THE CASE

This case began on February 21, 1989, when attorney Joel Krissman ("Krissman") made an unsolicited telephone call to James Cooke ("Cooke"), who, along with Mrs. Cooke, was a client of petitioner Brent Scott ("Scott"). [Exh. 15B:126-127] Krissman, knowing Scott was representing the Cooks as a result of Mr. Cooke's severe injury on a construction job, disparaged Scott as an attorney and touted his own firm's abilities to handle Cooke's case better than Scott could do. [Exh. 15B:127, 164] Krissman set an appointment with Mr. Cooke. [Exh. 15B:128-129]

Scott telephoned the Krissman firm seeking to ascertain why they were attempting to "steal" his clients, but the partners with whom he spoke had no knowledge of the call, assured him that Krissman or someone else would get back to him, and then never called him. [Exh. 15B:130-131, 659-662, 776-777]

The Cooke/Krissman appointment remained on calendar, and in an effort to protect his attorney/client relationship with the Cookes, Scott filed and served a lawsuit

against Krissman and his firm alleging intentional interference with his contract with the Cookes. [Exh. 15E: 663, 667]

The encounter with Krissman left the Cookes highly concerned about whether they had obtained a qualified attorney to handle their case, causing them not to sleep after the telephone call. [Exh. 15B:164, 168-169] While they ultimately did remain as clients of Scott, Scott testified that he spent substantial time, energy and money to retain the client's business, before obtaining for the client a settlement of $5.2 million. [RI-77, Exh. 15:598-599][2]

The Krissman firm made several efforts to get the case dismissed before trial, filing a demurrer and two motions for summary judgment. [Exhs. 105, 107, 15E:649] These efforts were decisively rejected by three different judges. (*Id.*) Petitioner made a good faith effort to settle the case before trial for $5,867.40, a fraction of his costs to that point. The offer was summarily rejected by the Krissman firm. [RI-88-89, Exh. 106] The petitioner also sought redress before trial with the State Bar of California, but was told that his only option was to pursue the matter in court. [Exh. 102]

Petitioner presented eight days of testimony before a jury. At the close of that testimony the trial judge, Judge James Ross, without explanation or argument by petitioner, granted the nonsuit motion of the defendants and, *sua sponte*, ordered a hearing to be held under California Code of Civil Procedure, section 128.5, as to sanctions against petitioner. [Exhs. 11, 13, 15G:935] Judge Ross invited the defendants to submit their written motion for attorney fees and ordered petitioner to file papers relating to the sanctions issue on the same date as

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[2] Scott estimated he had spent an additional $80,000 retaining the Scott's business before settling the case.

defendants' motion was due, without affording petitioner notice of his reasons for conducting the sanctions hearing and effectively denying him the opportunity to read and respond in a meaningful manner to the motion. [Exhs. 116, 119, 15G:936, RI-92]

At the sanctions hearing, the judge, before any presentations had been made, stated that he was "ready to rule." [Exh. 15G:941, RI-92] The defendants, along with their motion, had submitted declarations from nine attorneys and three expert witnesses, for costs purportedly incurred in their defense of the case. [Exhs. 114, 115][3] Judge Ross denied petitioner any opportunity to present witnesses on his own behalf or to examine the declarants under oath. [Exh. 15H: 961-962] Over petitioner's carefully articulated objections based on his constitutional rights to due process and to a jury trial, the judge assessed petitioner costs in the amount of $218,299.10. [Exhs. 14, 15H:943-953, 956, 961-963.]

Before the sanctions order was signed, petitioner filed and sought to serve on the judge a statement of disqualification based upon newly discovered evidence of the judge's admitted longstanding friendship and professional relationship with members of defendants' firm and upon the judge's hostile conduct towards petitioner throughout the trial. [Exhs. 121, 126, RI-93] Petitioner had also discovered that Judge Ross, along with Krissman partner Tom Stolpman, was still a member of the Los Angeles Trial Lawyers' Association ("LATLA"), the only judge to ever remain a LATLA member

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[3] Atty. Baker's declaration stated his fees were $250 an hour and that he had spent 270.5 hours of time, for a total bill of $67,625. [Exh. 114, last page.] Not until much later was it learned that he had submitted billings to Home Insurance Co. for that same lawsuit showing he had spent 69.25 hours before trial, with 13.75 hours billed at $125 per hour and the remainder at $175 for a total of $11,431.25. [Exh. 166]

after taking the bench; that both Judge Ross and Mr. Stolpman were past presidents of LATLA [Exh. 129]; that Mr. Stolpman had told a juror that he had known Judge Ross personally for over 20 years [Exh. 126]; that Judge Ross and partners in the Krissman firm had frequent social contacts [Exhs.126, 129] that during the time period shortly before trial, during trial, and shortly after trial, a total of 81 phone calls were placed from Judge Ross' courtroom and/or chambers to the Krissman firm while none were placed to Scott's office [Exhs. 126, 129].

Other examples of bias include the following: during the trial, the judge made and sustained his own objections. [Exh. 121, p. 9] Judge Ross never required the defendants to make an offer of proof on the relevancy of any evidence which was objected to by plaintiff. [Exh. 121, p. 9]
Mr. Stolpman was also allowed to sit in close contact with the jurors and to laugh and joke with them throughout the trial. [Exh. 121, p. 9:22-10:3] Judge Ross refused to grant side-bars requested by the plaintiffs' attorney during the examination of the plaintiff but never refused a side-bar when requested by the defense attorney. [Exh. 121, p. 10:4-7] When the defense attorney cross-examined witnesses, he was allowed to exceed the scope of the direct examination, but the same latitude was not allowed plaintiff on redirect. [Exh. 121, p. 10:8-11] The judge allowed the defense attorney to directly point his finger in the plaintiff's face during the defense's opening statement, but when requested by plaintiff to stop such insulting behavior, the judge refused to take any action. [Exh. 121, p. 10:12-17] In that chambers' visit, the judge told the jury that the case was frivolous and a waste of time, and explained to them that he had ordered a sanctions hearing against plaintiff. [Exh. 121, 15:6-12] When Mr. Scott attempted to put on evidence to rebut totally inappropriate statements made by defense counsel Baker in his opening statement, where he indicated that respondent didn't handle one or more other cases correctly, Judge Ross said the evidence was totally irrelevant, though he

had allowed the prejudicial comments in the opening statement. [Exh. 15D, 448:15 - 449:22] When respondent's co-counsel tried to argue damages, Judge Ross rather sarcastically brought up the amount of fee received by Mr. Scott for the Cookes' case and implied that the fee offset all damages claimed by respondent. [Exh. 15G, 917:7 - 918:16]

During the questioning of both Mr. Stolpman and Mr. Krissman by their counsel, Judge Ross interrupted several times to ask questions about mutual personal friends and/or acquaintances. [Exh. 121, 3:21-25]

When the process server attempted to serve Judge Ross with a statement of disqualification on the afternoon of February 11, 1992, before the sanctions order was signed, his clerk stated the judge was not there, although the process server saw him. There were two phone calls from Judge Ross' chambers or courtroom to Attorney Baker (defending the Krissman firm) immediately after the process server had attempted service. [Exh. 150:552-553][4] Because February 12, 1992 was a legal holiday, no mail was delivered to Judge Ross' courtroom until after 9:00 a.m. on February 13, 1992. The judgment on nonsuit and the order for sanctions were mailed by Baker's secretary on February 12, 1992, according to the proof of service. Yet Judge Ross stated that both documents were on his desk at 8:30 a.m. on February 13, 1992, and he signed them before accepting service of the statement of disqualification. [Exh. 37:20, RI:110-112]

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[4] During the time before, during and immediately after trial, there were 79 telephone calls placed from Judge Ross' courtroom to Atty. Baker's firm [Exhs.37:19, 145, 146:507-508, 550-551, 551-552, 549-550, 149], and 2 to Krissman's firm [Exhs 149, 150:552-556] There were no phone calls to Scott's law firm. [Exhs. 145, 146]

Scott exhausted his appeal rights in California state courts, without success. [Exhs. 132, 133, 135] In January of 1995 Scott, after consultation with other attorneys and additional research based on their information, filed a federal civil rights action against Krissman, Judge Ross and Robert Baker. [Exhs. 16, 138] After denial of motions to dismiss made by all three defendants in that action, the federal court was compelled to dismiss the action based on lack of subject-matter jurisdiction, without any hearing on the merits. [Exh. 140, RI:125-127]

After further consultation with other attorneys, Scott filed an action for equitable relief against Krissman and his firm on September 15, 1995, based on extrinsic fraud. [Exhs. 25, 157, RI:127-128] Defense motions to require Scott to furnish security, to name Scott as a vexatious litigant, a demurrer, a motion for summary judgment and a motion for reconsideration of the denial of summary judgment were all denied or overruled by the trial judge. [Exhs. 158-163] The Krissman firm's petition for a writ of mandate to the court of appeal was also denied. [Exh. 164] The court granted a nonsuit in that case. [RI-131]

Having discovered the discrepancies in Baker's billings (see footnote 3, *infra*) as a result of testimony in the equitable action, and having recently been subjected to a continuing pattern of defamatory statements by Judge Ross, by then retired, to other superior court judges, Scott filed an action against Ross and Baker in November of 1996 for fraud and defamation. [Exh. 37, RI-133-134] A defense demurrer was sustained without leave to amend, based on the statute of limitations and the application of collateral estoppel, even though Scott had only discovered the Baker's billing discrepancies just a few months earlier during the third action, and the defamation action against Judge Ross had been brought for the first time in that action. [Exh. 38] That defamation had only

begun in 1996, after Ross had retired from the bench in July of 1995. Nevertheless, Scott chose not to appeal the judgment, due to severe family medical problems in the diagnosis of a son with a brain tumor. When Judge Ross retired in 1995 he had several complaints pending against him with the California Commission on Judicial Performance. On April 30, 1998, that commission issued its Decision and Order Imposing Public Censure and Order Barring Judge Ross From Receiving Assignments. [A. 35]

On December 17, 1996, the State Bar of California filed disciplinary charges against petitioner for alleged violations of Business and Professions Code sections 6106, 6068(c) and 6068(g).[5] [Exh. C of petitioner's Petition for Review to CA Supreme Court.] After a trial, the State Bar Court judge, on October 5, 2000, rendered a decision recommending actual suspension of petitioner from the practice of law, even though the State Bar's recommendation had been only for a short stayed suspension. [A. 25] That decision found Scott not culpable of any wrongdoing as to the filing of the first three actions; it was based solely on the fourth action against Ross and Baker in 1996. Scott had been forced to file bankruptcy in 2000, and in an adversary proceeding by the Krissman firm, wherein most of the same testimony heard in the original trial was taken again, the federal judge found that "Scott did not willfully intend to injure plaintiffs," that he was credible, and that he had a "legal just cause . . .to vindicate his rights, and to protect himself and his client in his relationship with his

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[5] Thomas Stolpman, one of the senior partners at the Krissman firm, and a long-time friend of Judge Ross, was a member of the State Bar Board of Governors at the time the first action was filed against the Krissman firm, and became president of the State Bar the following year. [RI:119, 138] Mr. Stolpman was CTLA president in 1983 and gave a strong recommendation and assistance for Judge Ross being appointed to the Superior Court bench. [Exh. 121, 5:4-8]

client." [A. 26-34]

After an appeal to the Review Department of the State Bar Court by both Scott and the State Bar, that appellate department issued a published opinion in which it found that the record clearly and convincingly demonstrated that respondent was culpable as to all four lawsuits of filing and pursuing frivolous actions in bad faith and for a corrupt motive. It affirmed the discipline recommendation of the trial judge, for a suspension of two years, stayed, with actual suspension for 60 days, and probation for two years, with a requirement to take and pass the Multistate Professional Responsibility Exam within one year, and pay the costs of the State Bar.

How the federal questions were preserved.

Petitioner first raised the question of due process in his first appeal from the order granting the sanctions against him. Except for the court of appeal stating in its opinion that Scott had been given a sufficient hearing on the sanctions, the issue was not addressed by that court. The entire State Bar Court trial was about the lack of fairness in the original trial of the action against the Krissman firm, and the State Bar Court judge found no culpability on Scott's part as to the first three lawsuits he filed, but did find culpability as to the fourth one. On appeal to the Review Department, however, that decision held Scott culpable in general for all four actions. [A 1-25] In his Petition for Review to the California Supreme Court, Scott raised the issues of violation of his right to due process and of the unconstitutionality of California's Business and Professions Code sections 6106, 6068(c) and 6068(g).

The status and jurisdiction of the State Bar Court.

The California State Bar Court was created by the Supreme Court of California through adoption of Rules of

Court on March 19, 1956, pursuant to the provisions of California Business and Professions Code section 6102. Its authority is defined in California Rules of Court, rule 951. The standard of review for the State Bar Court Review Department is a de novo review, as set forth in rule 951.5. State Bar Court judges are appointed by the California Supreme Court, pursuant to rule 961. Review of State Bar Court decisions is first by the State Bar Court Review Department, and then by petition for review to the California Supreme Court (rule 952), thus paralleling the other state courts which provide for review of a superior court decision by a district court of appeal, and review of that court's decision through a petition for review to the California Supreme Court.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS, HIGHLIGHTS A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS AND HAS PROFOUNDLY DISTURBING IMPLICATIONS FOR PLAINTIFFS' ATTORNEYS THROUGHOUT THE COUNTRY WHEN AN ATTORNEY, WHO WAS SANCTIONED $218,299.10, HAD PROBABLE CAUSE TO FILE THAT ACTION, AND WHEN THE REMAINING THREE ACTIONS WERE FILED ON DIFFERENT CAUSES OF ACTION IN AN ATTEMPT TO OVERTURN THE PUNITIVE SANCTIONS LEVIED AGAINST HIM BY A JUDGE WITH CLOSE TIES TO THE DEFENDANTS, WITHOUT ADVANCE NOTICE OF THE REASONS FOR THE SANCTIONS' HEARING, AND WITHOUT ACCORDING THE ATTORNEY AN EVIDENTIARY HEARING,.

This case raises a constitutional issue of first impression

which has profoundly disturbing implications for plaintiffs' attorneys throughout the country, for their clients, and for the very meaning of advocacy in an adversarial system: may an attorney be disciplined for having substantial punitive sanctions imposed on him after he proceeded to trial and lost the case where three prior judges had overruled a demurrer and denied two motions for summary judgment? Inherent in that question is the additional question of whether the state's legal disciplinary agency can ignore the state law that denial of a summary judgment motion itself is evidence of probable cause to bring the action?

Among the basic procedural protections that are a part of constitutional due process are the standards and quanta of proof by which the substantive rights of litigants are determined. See *In re Winship*, 397 U.S. 358 (1970). Where particular standards and quanta of proof have been found to place undue "risks of error" on a litigant or to be otherwise inconsistent with the purposes they were designed to serve, this Court has not hesitated to hold such standards and quanta to be violative of the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., *Addington v. Texas*, 441 U.S. 418, 427 (1979); *Santosky v. Kramer,* 455 U.S. 745, 754, 764 (1982); *In re Winship, supra,* 397 U.S. 358.

Although the inconsistent application of standards and quanta of proof required for summary judgment on the one hand, and the imposition of sanctions on the other, has not been squarely subjected by this Court to constitutional due process scrutiny, two circuit courts of appeals, which have been confronted by similar claims, have handed down decisions under federal rules of procedure which run in starkly different directions. On the one hand, the Third Circuit in *Gillette Foods Inc. v. Bayernwald-Fruchtverwertung*, 977 F.2d 809, 814 (3d Cr. 1992), in reversing a federal district court's exercise of its "inherent power" to impose

$25,000 sanctions on plaintiff's counsel, held that the imposition of such sanctions was "inconsistent" with the fact that plaintiff's pleadings had survived three summary judgment motions, a motion for involuntary dismissal made at trial, as well as a motion for sanctions under Fed. R. Civ. P. 11 and had to be overturned. See also *Klein v. Stahl GMBH & Co.*, 185 F.3d 98, 110 (1999). The lower court's imposition of sanctions was vacated even though the trial judge had found that the evidence at trial demonstrated that plaintiff's claim against one of the defendants was "utterly without merit both factually and legally" and even though the inclusion of that defendant was deemed to have been "an egregious litigation tactic" employed in "bad faith." It was the Third Circuit's view that a denial of summary judgment should ordinarily be sufficient to preclude a finding of "bad faith" necessary to the imposition of attorney sanctions under the court's common law powers.

On the other hand, a dramatically different result was reached by the First Circuit in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988), which held that the fact that a plaintiff's pleadings survived a summary judgment motion did not automatically preclude the issuance of Rule 11 attorney sanctions, at least where subsequent depositions revealed the prior existence of a factual dispute to have been "illusory." In so ruling, that Court, per Breyer, C.J., remarked in broad dicta that the federal "summary judgment standard (based on filed documents) and Rule 11's standard (based on what reasonable inquiry should have revealed, perhaps about other information)" were not "necessarily or inevitably congruent," and thus, impliedly, did not require congruent treatment.

In California, the Supreme Court approved the holding in *Roberts v. Sentry Life Insurance*, 90 Cal. Rptr. 2d 408, 413 (1999) that denial of a summary judgment motion establishes probable cause for the bringing of the lawsuit. *Wilson v.*

Parker, Covert & Chidester, 123 Cal.Rptr.2d 19, 22 (2002). Where, as here, a lawsuit has survived one or more demurrers and summary judgment motions - - and has thus been judicially determined under the California law which should have been followed to raise viable claims of law and triable issues of material fact - - such a lawsuit can never be deemed "frivolous" or in "bad faith," absent an explicit determination that the evidence presented at trial substantially conflicted with the pleadings and documentary evidence produced in opposing the motions. Under California law motions for summary judgment are only to be granted if it is determined that there are "no triable issue[s] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Cal. Code Civ. Proc. § 437c(a). Motions for summary judgment as well as oppositions thereto, are to be "supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." § 437c(b). Consequently, a cause of action which has survived summary judgment based upon the appropriate evidentiary attachments has been judicially determined to be sound "as a matter of law," to present "triable issues of fact," and thus, to be non-frivolous. *Wilson v. Parker, Covert & Chidester, supra,* 123 Cal.Rptr.2d at 22.

While a trial judge may grant a motion for nonsuit at the close of plaintiff's case where, under the evidence presented, "no possibility exists that a cause of action can be proved,"[6] attorneys may be sanctioned for improperly litigating a

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[6] In ruling on a motion for nonsuit, "[a]n appellate court must resolve every conflict in the evidence in favor of the plaintiff, consider every reasonable inference and every presumption which supports the plaintiff, and accept as true all direct or indirect evidence which tends to sustain the plaintiff's case." *Ayer v. Boyle*, 112 Cal.Rptr. 636, 639-640 (Cal.Ct.App. 1974); see *Carson v. Facilities Development Co.*, 686 P.2d 656, 660 (Cal. 1984).

nonsuited case under Cal.Code Civ. Proc. § 128.5 only if the attorney has engaged in 'bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."[7]

In the original action below, two different judges expressly determined independently that the lawsuit presented "triable issues of fact," and effectively ruled that the defendants were not "entitled to judgment as a matter of law." (Exh. 15D:649) At no time did the trial court make any judicial determination that the plaintiff's evidence at trial failed to conform to his pretrial pleadings or that the trial testimony materially differed from the pretrial testimony. To the extent that the trial court, the Court of Appeal and the State Bar Court Review Department adopted a view of the legal elements of plaintiff's claims which substantially differed from the views of the motions' judges who denied the summary judgment motions and overruled the demurrer, this only highlighted the unfair, illogical and, at bottom, unconstitutional risks that plaintiff was made to run. Attorneys must surely be able to place some reliance on rulings by motion judges that their pleadings, as supported by evidentiary attachments, were sufficiently sound not only to survive a summary judgment motion, but to avoid being labeled "frivolous" or "bad-faith actions," warranting the imposition of such draconian sanctions. The "risks of error" imposed on petitioner as a result of the glaringly inconsistent and irrational application of California's standards and quanta of proof constituted a flagrant violation of the Due Process Clause.

The California scheme has disturbingly broad implications for an adversarial system such as ours in which

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[7] The term "frivolous" is defined in § 128.5 as meaning "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

"lawyers [must] be able to make honest, good-faith efforts to present their client's cases." *In re McConnell*, 370 U.S. 230, 236 (1962). "[A]n attorney is not an insurer . . . that his client will win litigation[;] [r]ather, he has a duty to represent his client zealously . . . [by seeking] any lawful objective through legally permissible means . . . [and by presenting] for adjudication any lawful claim, issue, or defense." A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1). "If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." *Kassan v. Bledsoe*, 60 Cal.Rptr. 799, 803 (Cal.App.Ct. 1967) (citation omitted).

As a consequence of the decision below, attorneys in California will be compelled to second-guess judges and to voluntarily seek dismissal of their own clients' cases if they believe that in spite of surviving one or more pretrial motions, they cannot win the action at trial. That is an outcome which strikes at the very heart of the adversarial system by converting attorneys into judges of their own cases.[8] If they do not, they

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[8] As the California Supreme Court has stated in the leading California case on sanctions: "Counsel face the danger of being trapped between their obligation to their clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims. '[An] attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.' (Citation) The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of a fear of personal liability. To decide otherwise 'would inject undesirable self-protective reservations into the attorney's counselling role,' and prevent counsel from devoting their entire energies to their clients' interests." *In re Marriage of Flaherty*, 183 Cal.Rptr. 508, 514 (1982).

face the possibility of not only debilitating sanctions awards against them, but serious discipline by the State Bar.

Because California's scheme, as construed by its courts, unfairly and irrationally places the risks and consequences of error on plaintiffs' attorneys by allowing for the imposition of highly punitive sanctions and suspension or disbarment upon them even where they have been given a green light by one or more motions' judges, because the lower courts addressing this question have reached different conclusions, and because this case raises a recurring question of great importance to plaintiffs' attorneys throughout the country, certiorari should be granted.

II.

THE DECISION BELOW, BY IMPOSING DISCIPLINE ON PETITIONER OCCASIONED BY THE PUNITIVE SANCTIONS AWARD LEVIED AGAINST HIM WITHOUT INQUIRING INTO THE FACT THAT THE TRIAL COURT DID NOT ACCORD HIM THE RIGHT AND TIME TO RESPOND IN WRITING TO THE CHARGES, THE RIGHT TO CONTEST IN A FULL EVIDENTIARY HEARING THE WORK AND TIME WHICH OPPOSING COUNSELS' DECLARATIONS SET FORTH AND THE RIGHT TO HAVE THE HEARING HELD BEFORE AN UNBIASED JUDGE, VIOLATES THE ATTORNEY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A JURY TRIAL.

While courts possess inherent power to regulate conduct within their courts, including assessing counsel fees and levying sanctions in response to genuinely abusive litigation

practices, that power must be "exercised with great caution." *Chambers v. NASCO* 501 U.S. 32, 41 (1991); see also *Link v. Wabash R. Co.* 370 U.S. 626, 630-633 (1962). There are minimal procedural due process requirements which must be met before such fees may be assessed or such sanctions imposed. *Roadway Express, Inc. v. Piper* 447 U.S. 752, 766-767 & n. 14 (1980).

The phrase "due process" expresses the requirement of "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Ingrained in our concept of due process is the requirement of notice and an opportunity to be heard. *Lambert v. California* 355 U.S. 225 (1958). That right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Another essential element of a fair hearing is an impartial judge. *Tumey v. Ohio*, 273 U.S. 510 (1927). A judge cannot be both prosecutor and judge. *In re Murchison*, 349 U.S. 133 (1955).

While this Court has made clear that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record, the Court has never definitively enumerated exactly which basic procedural protections are necessary before substantial punitive attorney sanctions may be imposed. *Roadway Express v. Piper, supra,* 447 U.S. at 767. The federal circuit courts of appeals, in addressing the constitutional requirements for the imposition of attorney sanctions by federal district courts, have differed as to the level of protection necessary. While many circuits have afforded district court judges wide latitude in determining the circumstances under which the various features of an adversarial hearing may be necessary - see *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 392 (2d Circ.), *cert. denied,* 493 U.S. 1003 (1989); *Alizadeh v. Safeway*

Stores, Inc., 910 F.2d 234, 236-237 (5th Cir. 1990); *Kapco Mfg. Co., Inc. v. C&O Enterprises, Inc.*, 886 F.2d 1485, 1494-1495 (7th Cir. 1989); *Dodd Ins. Services, Inc. v. Royal Ins. Co. of America*, 935 F.2d 1152, 1160 (10th Cir. 1991) - other circuit courts have mandated comparatively extensive procedural protections, especially where the sanctions imposed are punitive. See *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 346 (5th Cir. 1990). See also *Donaldson v. Clark*, 819 F.2d 1551, 1559-1561 (11th Cir. 1987).

While few of the ingredients of a full-blown evidentiary hearing are necessary in cases where the amount of the sanctions under consideration is small and merely compensatory, where the sanctions are substantial, or as here, punitive, there are, as the Ninth Circuit observed, particularly "compelling reasons" for the provision of more stringent procedural requirements:

> "[T]he attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and the facts supporting the sanction will appear in the record, facilitating appellate review."

Miranda v. Southern Pacific Transp. Co., 710 F.2d 516, 522-523 (9th Cr. 1983). See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (constitutional due process imposes substantive limits on the size of punitive damage awards); *Honda Motor Co., Ltd. v. Oberg*, 62 U.S.L.W. 4627, 4631 (U.S. Jun. 24, 1994) (No. 93-644); *International Union, United Mine Workers of America v. Bagwell*, 62 U.S. L.W. 4705, 4708 (U.S. Jun. 30, 1994) (No. 92-1625). This is because the imposition of severe or punitive sanctions tends to pose a

"danger of chilling the diligent pursuit of lawsuits by an attorney for his or her client." *Monex International, Ltd. v. Peinado*, 274 Cal.Rptr. 667, 670 (Cal.App.Ct. 1990).

California's statutory regime, while expressly requiring that attorneys subject to sanctions be given "notice and opportunity to be heard," has been construed by the state courts in such a way as to give the lower courts unbridled discretion in deciding exactly which procedural protections are constitutionally necessary in a given case. Although the California Supreme Court in *Lavine v. Hospital of the Good Samaritan*, 215 Cal.Rptr. 708, 714 (Cal.App.Ct. 1985) upheld the constitutionality of § 128.5 on the ground that the statute does not *preclude* a party facing sanctions from subpoenaing witnesses and producing evidence, the statute has been construed in other cases so as not to *require* that courts afford parties these basic procedural protections. See, e.g., *Endler v. Schutzbank*, 436 P.2d 297, 303 (Cal. 1968); *Lesser v. Huntington Harbor Corp.*, 219 Cal.Rptr. 562, 567 (Cal.App.Ct. 1985). Whereas some California courts have been comparatively demanding of judges considering the imposition of sanctions others have been far less exacting. Compare *In re Marriage of Flaherty, supra*, 646 P.2d at 190, *Lesser v. Huntington Harbor Corp., supra*, 219 Cal.Rptr. at 568, with *In re Marriage of Quinlan*, 257 Cal.Rptr. 850, 853 (Cal.App.Ct. 1989). Attorneys in California have thus been left with little basis for predicting what process will be afforded them before a court decides whether to impose sanctions upon them.
Due process is a flexible concept, and must be tailored to the requirements of each particular situation. There is no procedure that is universally applicable to every imaginable situation. *Cafeteria Workers* v. *McElroy* 367 U.S. 886, 895 (1961).

In the instant case, Judge Ross, at the close of petitioner's case, granted defendants' motion for nonsuit and,

sua sponte, ordered that a sanctions hearing be held pursuant to Cal. Code Civ. Proc. § 128.5, without giving any reasons for the hearing. At the hearing, while the judge ultimately allowed petitioner to present legal argument, he expressly refused to allow petitioner to call witnesses or to examine the source of hearsay declarations presented to the court by defendants, stating, "No. That's denied. You are supposed to do it by declarations, counsel. I'm not going to violate every rule of court for you." (Exh. 15H:961-962) Petitioner meticulously objected to the judge's procedures, asserting his constitutional rights to due process and to a jury trial. (Exh. 15H:943-944) The judge nonetheless imposed $218,299.10 in sanctions on him. The judge's conduct of the hearing thus violated petitioner's due process right to an evidentiary hearing. Given the exorbitant and highly punitive nature of the sanctions imposed, the defendant's right to a jury trial under the terms of the Seventh and Fourteenth Amendments, was also violated. See *International Union, United Mine Workers of America v. Bagwell, supra*, 62 U.S. L. W. at 4708.[9]

Given the increasing frequency with which sanctions are imposed, given the disparate constitutional treatment among the courts, and given the potential chill on zealous advocacy cast by the imposition of exorbitant, if not punitive, attorney sanctions, this Court's guidance is needed to contain the unconstitutionally broad discretion permitted judges under

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[9] Cal.Code Civ. Proc. § 128.5, in general allows only for the imposition of "reasonable expenses, including attorney's fees," and, except in circumstances not applicable here, does not permit the imposition of "punitive" sanctions. Because petitioner was barred by the judge from examining members of the Krissman firm and their defense counsel in order to determine how their fees and expenses were arrived at, he was effectively precluded from establishing that the sanctions amount was not merely compensatory, as provided for in § 128.5, but was effectively punitive.

schemes such as California's. This Court should thus grant certiorari in order to resolve the growing split amongst the circuit courts and amongst the state courts, and to provide much needed uniformity in this most critical area of the law.

III.

SECTION 6068, SUBDIVISIONS (c) AND (g), OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS UNCONSTITUTIONAL AS VAGUE AND OVERBROAD BECAUSE THE STANDARDS BY WHICH ATTORNEYS MUST MEASURE THEIR CONDUCT ARE UNDEFINED AND SUBJECTIVE.

Although Scott was originally charged by the State Bar with violation of these two parts of section 6068 and of section 6061 as well, the final judgment of the State Bar Court and its Review Department found him culpable only under subdivisions (c) and (g). (A. 1) Those two subdivisions deal with one of the "most precious of the liberties safeguarded by the Bill of Rights," the right to petition for a redress of grievances, which is "intimately connected" with the rights of free speech and free press. *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217, 221 (1967).

In order to find Scott in violation of (c) the court had to find that he, in fact, maintained actions which *he* did not find "legal" or "just" and that he had a "corrupt motive of passion or interest." The terms "legal" and "just" as used in section 6068 are not defined and leave attorneys guessing at their meaning, which depends on a subjective assessment by the one defining them. Hence the accused attorney is not given fair warning in language that a person of reasonable intelligence can understand as to what the law requires of an action to ensure that it is "legal" and "just."

The lead-in language of "such as appear to him" is also subjective and vague, since it requires an inquiry into the attorney's state of mind, which may well differ from time to time and from case to case, and from attorney to attorney. Speech and action by attorneys on matters of legal representation is accorded the strongest protection our Constitution has to offer Inhibiting or punishing that speech or action can destroy an attorney's reputation and the enjoyment of one's good name and reputation has been recognized repeatedly as being among the most cherished of rights enjoyed by a free people, falling within the concept of personal liberty. *Zauderer v. Office of Disciplinary Control of Supreme Court*, 471 U.S. 626, 670 (1985) ("*Zauderer*".)

The first task of a court is to determine if the enactment reaches a substantial amount of constitutionally protected conduct, and if it does, then a stringent vagueness test must apply. *United States v. Wunsch*, 84 F.3d 1110, 1119 (1996) (holding unconstitutional subdivision (f) of section 6068 of the California Business and Professions Code). A hypothetical ban on all "actions, proceedings or defenses" that do not "appear to him. . . legal or just" forbids speech and actions in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, making it presumptively unconstitutional. *Zauderer, supra,* 471 U.S. at 665. The words in the statute are chillingly similar to an ordinance that made it a criminal offense for "three or more persons to assemble. . .on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by," held void on its face and unconstitutionally broad in punishing protected conduct. *Coates v. Cincinnati*, 402 U.S. 611 (1971). Thus the overbreadth doctrine applies if an enactment prohibits a substantial amount of constitutionally protected conduct, here, the First Amendment right to freely petition to right a perceived wrong. The prohibition in section 6068 is far broader than necessary to protect defendants'

interests in the disciplinary system.

Scott believed that every action he took was both "legal" and "just" because every client has a constitutional right under the petition clause to vigorously advocate his client's interests with respect and moderation. The fact that Scott, an attorney, was, himself, the client, should not give rise to a different standard nor be applied in a different way. A state should not be able to hold discipline as a stick over an attorney's head for doing what he could do for a non-attorney client. That double standard cannot help but have a chilling effect on all plaintiffs' counsel. No judge except Judge Ross - whose objectivity must be questioned in light of his relationship with the defense firm - found Scott to be a vexatious litigant or to have violated any rules of conduct or have abused legal process in any way, and for that the State Bar disciplined him. Indeed, in the original lawsuit, three judges had found Scott had good cause, in overruling first a demurrer and then two summary judgment motions brought by the defense. The guarantees of the right to petition and the right to have clear and understandable laws that regulate conduct apply just as fully to attorneys as to non-attorneys. *Zauderer, supra*, 471 U.S. at 666. Even given that there is some room for enforcement of standards involving attorneys that might be impermissibly vague in other contexts, where an attorney may be properly punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession. . . [citation], where the appraisal of an attorney's conduct is one about which reasonable men differ, and where the state has not proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. [Citation]" *Id.*

Incorporating all of the above, the prohibition against commencing or pursuing any action for any "corrupt motive or interest" is equally vague. It is not defined anyplace and gives

no guidance as to the difference between what is simply zealous advocacy and what is "corrupt," nor does it explain what circumstances will demonstrate that corruption. So also one is unable to define what is required to show "encouragement" of the subject lawsuit. Such a ban would presumably prevent an attorney from bringing an action for an improper motive even though the claim or defense was based on sound legal reasoning and probable cause. Like subdivision (c), subdivision (g) appears to distinguish favored from disfavored court speech on the basis of the ideas or views expressed. Hence the statute is impermissibly content-based and violates the petition clause of the First Amendment.

Neither subdivision furthers an important or substantial governmental interest unrelated to the suppression of expression, and the resulting limitation on protected court speech is greater than necessary or essential to the protection of the governmental interest in disciplining lawyers for the protection of the public. Because of the vagueness and overbreadth of the subdivisions, clients are subject to being harmed because of the overcautious approach taken by their attorneys who are fearful of being disciplined.

Statutes such as the (c) and (g) sections of 6068, which by their terms distinguish favored from disfavored court speech on the basis of the ideas or views expressed, are content-based and thus infringe on speech and petition rights protected by the First Amendment. The Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-430 (1982). The vital purpose of the constitution is undermined when a litigant who, in good faith, files a claim or defense invoking the statutory provisions for redress of grievances by the filing of a law suit, may have his protected right burdened by a statute subjecting him to discipline.

Even California law, had it been followed, does not allow for such results. "The act of an attorney which reasonably may be reconciled with the pursuit of a legal remedy invoked under a misconception of rights may not be characterized as one of those denounced by the statute." *Sullivan v. State Bar of California*, 170 P.2d 888, 892 (1946).[10] As the California Supreme Court noted in *Sullivan*, even if the conduct may fall below that of "an ethical lawyer endeavoring to uphold the high principles of an honorable profession," it is not always cause of suspension or disbarment, because the act complained of must come *clearly* within the conduct barred by the Legislature. *Id.*

Thus the statutory scheme under which Scott was disciplined should be found to be unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] *Sullivan* was overruled on other grounds by *Stratmore v. State Bar of California*, 123 Cal.Rptr. 101 (1975).